STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY A. LEWIS, Plaintiff-Appellant,	UNPUBLISHED July 31, 2014
v	No. 315730 Midland Circuit Court
ANN MARIE LEWIS, Defendant-Appellee.	LC No. 12-008858-DO

Before: O'CONNELL, P.J., and FITZGERALD and MARKEY, JJ.

PER CURIAM.

Plaintiff appeals as of right the award of spousal support in a judgment of divorce. We affirm.

Plaintiff filed for divorce in July 2012 after nearly ten years of marriage to defendant. The Department of Veterans Affairs (VA) has determined that plaintiff is 100 percent disabled due to an epileptic condition, and the resulting disability payments are his only source of income. Plaintiff presented to the court a monthly budget and requested that the court not award spousal support to defendant. Defendant testified she was able to work, but that she had been caring for plaintiff for several years and remained unemployed despite looking for work. She presented a budget that calculated future expenses and transition costs of $1,250 per month. The trial court found that plaintiff had the ability to pay spousal support and that defendant had a need for transitional spousal support. Accordingly, the court ordered plaintiff to pay $1,250 in monthly spousal support for 18 months. Plaintiff filed for reconsideration, arguing that his disability income was protected and non-assignable under federal law and Supreme Court precedent. The trial court denied reconsideration.

Plaintiff argues that 38 USC 5301(a)(1), and *Mansell v Mansell*, 490 US 581; 109 S Ct 2023; 104 L Ed 2d 675 (1989), preclude the use of his VA disability payments as spousal support. Section 5301(a)(1) states:

> Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law, and such payments made to, or on account of, a beneficiary shall be exempt from taxation, shall be exempt from the claim of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. . . .

Mansell only indirectly addresses the issue presented in this case. In *Mansell*, the case involved waived retirement pay that secured disability benefits, but not the disability benefits directly. *Mansell*, 490 US at 585-586; see *Megee v Carmine*, 290 Mich App 551; 802 NW2d 669 (2010). The Court's discussion and holding focused primarily on the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 USC 1408. *Mansell*, 490 US at 588-589, 594-595. In fact, the Court noted it was not considering the anti-attachment clause: "Because we decide that the Former Spouses' Protection Act precludes States from treating as community property retirement pay waived to receive veterans' disability benefits, we need not decide whether the anti-attachment clause, § 3101(a),[1] independently protects such pay." *Mansell*, 490 US at 587 n 6.

In *Magee*, this Court considered at length the decision in *Mansell*. In relevant part, *Megee* summed up *Mansell* as follows:

> We glean from *Mansell* some important, but subtle, points. First, *Mansell* did not entail an attempted division or distribution of the husband's VA disability benefits; rather, it concerned payments to the wife in an amount equal to half of the husband's total retirement pay, even though a portion of that pay was no longer being received by the husband, considering that he had waived receipt of that portion in favor of VA disability benefits. The trial court here effectively divided plaintiff's CRSC [combat-related special compensation] and, although *Mansell* did not directly address division of disability pay, the USFSPA clearly does not allow such a division. . . . [*Megee*, 290 Mich App at 566.]

Megee held that a military spouse may not agree to pay half of his retirement pay as spousal support, but then elect, post-judgment, to receive disability pay in an attempt to avoid the obligation to the former spouse. *Id*. at 574-575.

The following analysis from *In re Marriage of Morales*, 230 Or App 132, 139; 214 P3d 81 (2009), is instructive:

> Although Oregon courts have not expressly addressed whether the Court's holding in *Mansell* extends to bar a court from considering VA disability benefits received in lieu of military retirement benefits for purposes of awarding spousal support, nearly every state court that has addressed that question has concluded that *Mansell* affects property division, not spousal support. Hence, those courts have concluded that federal law does not prevent a court from considering a party's VA disability benefits as a source of income for purposes of awarding spousal support. *See, e.g., Murphy v. Murphy*, 302 Ark. 157, 159, 787 S.W.2d 684, 685 (1990) (stating that nothing in federal law relieved former husband, whose income consisted of VA disability payments, from paying spousal support); *Riley v. Riley*, 82 Md.App. 400, 410, 571 A.2d 1261, 1266 (1990) (VA

[1] 38 USC 3101 was later recodified at 38 USC 5301. *In re Cook*, 406 BR 770, 773 (2009), PL 102-40 (1992).

benefits may be considered as resource for purposes of setting alimony award); *Steiner v. Steiner*, 788 So.2d 771, 778 (Miss.2001) (same); *Holmes v. Holmes*, 7 Va.App. 472, 485, 375 S.E.2d 387, 395 (1988) (same); *Weberg v. Weberg*, 158 Wis.2d 540, 544-45, 463 N.W.2d 382, 384 (Ct.App.1990) (same); see also *Clauson v. Clauson*, 831 P.2d 1257, 1263 n. 9 (Alaska 1992) (stating in dicta that a "state court is clearly free to consider post-divorce disability income and order a disabled veteran to pay spousal support even where disability benefits will be used to make such payments"); *Davis v. Davis*, 777 S.W.2d 230, 232 (Ky.1989) (noting that, although VA disability benefits were not divisible as property, courts could resolve an inequitable property division with a spousal support award); but see *Ex parte Billeck*, 777 So.2d 105, 109 (Ala.2000) (holding that federal law precludes courts from considering VA disability payments in awarding alimony).

The trial court in present case reasoned that once the "funds have been deposited into the account of the Plaintiff they are subject to whatever uses he wishes" and thus they could be used to satisfy the support order. The United States Supreme Court specifically addressed "whether benefits paid by the United States Veterans' Administration retain their exempt status . . . after being deposited in an account in a federal savings and loan association." *Porter v Aetna Cas & Surety Co*, 370 US 159, 159-160; 82 S Ct 1231; 8 L Ed 2d 407 (1962). The distinction is not whether the money is deposited into an account, but rather whether the money is "converted into 'permanent investments.'" *Id*. at 160. Where the funds "are readily available as needed for support and maintenance, [they] actually retain the qualities of moneys, and have not been converted into permanent investments." *Id*. at 162. *Porter*, however, involved a creditor attachment of a savings account and two savings and loan accounts in order to secure a judgment. *Porter*, 370 US at 160. Such an action is clearly barred by the plain language of § 5301(a)(1). But that is not the situation at issue here.

The plain language of § 5301(a)(1) prevents attachment of veterans' disability benefits from taxation and creditors. It says nothing specifically or indirectly about using the monies when considering an award of spousal support in a divorce action. Accordingly, no plain error has been shown.

Affirmed.

/s/ Peter D. O'Connell
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey